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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-512

ALAN F. HUGHES, INC. and
ALAN F. HUGHES,

Petitioner,

v.

SECURITIES AND EXCHANGE COMMISSION
SECURITIES INVESTOR PROTECTION
CORPORATION,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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SECURITIES INVESTOR PROTECTION
CORPORATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

CITATION TO OPINIONS BELOW

Petitioner requests that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Second Circuit made on June 21, 1973.

A copy of the decision is appended hereto per this court's Rule 23(i).

JURISDICTION

Petitioner invokes this court's jurisdiction under this court's Rule 19(b) because the court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court.

(a) The decision and judgment was filed on June 21, 1973 (no time of entry recorded) and the mandate issued on August 30, 1973.

(b) There has been no extension of time within which to petition for certiorari, and no order respecting a rehearing has been requested or entered.

(c) This Court has jurisdiction to review this case pursuant to 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

The questions presented for review, expressed in the terms and circumstances of the case at bar are as follows:

1. Whether failure to provide for payment of reasonable attorney's fees earned in representing a securities broker dealer in a Securities Investor Corporation liquidation application proceeding is arbitrary and capricious and constitutes,

(a) a denial of due process, a denial of assistance of legal counsel, and a denial of equal protection of the law?

(b) is a taking of the attorney's property right in his professional time without just compensation?

(c) is a violation of the Securities Investor Protection Act of 1970 and the Bankruptcy Act?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. United States Constitution, Amendment V:

"No person shall be . . . deprived of life, liberty or property without due process of law. . . ."

2. Statutes:

(a) Pub. Law 91-598, December 30, 1970, 84 STAT. 1637

* * * * *

SEC. 3. SECURITIES INVESTOR PROTECTION CORPORATION.

(a) CREATION.–There is hereby established a body corporate to be known as "Securities Investor Protection Corporation" (hereafter in this Act referred to as "SIPC"). SIPC shall be a nonprofit corporation and shall have succession until dissolved by act of the Congress. SIPC shall–

(1) not be an agency or establishment of the United States Government;

(2) be a membership corporation the members of which shall be–

(A) all persons registered as brokers or dealers under section 15(b) of the 1934 Act, and

(B) all persons who are members of a national securities exchange,

other than persons whose business as a broker or dealer consists exclusively of (i) the distribution of shares of registered open end investment companies or unit investment trusts, (ii) the sale of variable annuities, (iii) the business of insurance, or (iv) the business of rendering investment advisory services to one or more registered investment companies or insurance company separate accounts; and

(3) except as otherwise provided in this Act, be subject to, and have all the powers conferred upon a nonprofit corporation by, the District of Columbia Nonprofit Corporation Act (D.C. Code, sec. 29-1001 and fol.).

* * * * *

SEC. 4. SIPC FUND.

(a) IN GENERAL.–

(1) ESTABLISHMENT OF FUND.–SIPC shall establish a "SIPC Fund" (hereinafter in this Act referred to as the "fund"). All amounts received by SIPC (other than amounts paid directly to any lender pursuant to any pledge securing a borrowing by SIPC) shall be deposited in the fund, and all expenditures made by SIPC shall be made out of the fund.

* * * * *

(c) ASSESSMENTS.–

(1) INITIAL ASSESSMENTS.–Each member of SIPC shall pay to SIPC, or the collection agent for SIPC specified in section 9(a), on or before the one hundred and twentieth day following the date of enactment of this Act, an assessment equal to one-eighth of 1 per centum of the gross revenues from the securities business of such member during the calendar year 1969, or if the Commission shall determine that, for purposes of assessment pursuant to this paragraph, a lesser percentage of gross revenues from the securities business is appropriate for any class or classes of members (taking into account relevant factors, including but not limited to types of business done and nature of securities sold), such lesser percentages as the Commission, by rule or regulation, shall establish for such class or classes, but in no event less than one-sixteenth of 1 per centum for any such class. In no event shall any assessment upon a member pursuant to this paragraph be less than $150.

(2) GENERAL ASSESSMENT AUTHORITY.–SIPC shall, by bylaw or rule, impose upon its members such assessments as, after consultation with self-regulatory organizations, SIPC may deem

necessary and appropriate to establish and maintain the fund and to repay any borrowings by SIPC.

* * * * *

SEC. 5. PROTECTION OF CUSTOMERS.

(a) DETERMINATION OF NEED OF PROTECTION.–

(1) NOTICE TO SIPC.–If the Commission or any self-regulatory organization is aware of facts which lead it to believe that any broker or dealer subject to its regulation is in or is approaching financial difficulty, it shall immediately notify SIPC, and, if such notification is by a self-regulatory organization, the Commission.

(2) ACTION BY SIPC.–If SIPC determines that any member has failed or is in danger of failing to meet its obligations to customers and that there exists one or more of the conditions specified in subsection (b)(1)(A), SIPC, upon notice to such member, may apply to any court of competent jurisdiction specified in section 27 or 21(e) of the 1934 Act for a decree adjudicating that customers of such member are in need of the protection provided by this Act.

* * * * *

(b) COURT ACTION.–

(1) ISSUANCE OF DECREE.–

(A) FINDINGS BY COURT.–A court to which application is made pursuant to subsection (a)(2) shall grant the application and issue a decree adjudicating that customers of the member named in the application are in need of protection under this Act if it finds that such member–

(i) is insolvent within the meaning of section 1(19) of the Bankruptcy Act, or is unable to meet its obligations as they mature, or

(ii) has committed an act of bankruptcy within the meaning of section 3 of the Bankruptcy Act, or

(iii) is the subject of a proceeding pending in any court or before any agency of the United States or any State in which a receiver, trustee, or liquidator for such member has been appointed, or

(iv) is not in compliance with applicable requirements under the 1934 Act or rules or regulations of the Commission or any self-regulatory organization with respect to financial responsibility or hypothecation of customers' securities, or

(v) is unable to make such computations as may be necessary to establish compliance with such financial responsibility or hypothecation rules or regulations.

* * * * *

(3) APPOINTMENT OF TRUSTEE.—If the court grants an application and makes an adjudication under paragraph (1), the court shall forthwith appoint as trustee for the liquidation of the business of the debtor in accordance with section 6, and as attorney for such trustee, such persons as SIPC shall specify.

* * * * *

SEC. 6. LIQUIDATION PROCEEDINGS.

(a) GENERAL PURPOSES OF LIQUIDATION PROCEEDING.—The purposes of any proceeding in which a trustee has been appointed under section 5(b)(3) (hereafter in this section referred to as a "liquidation proceeding") shall be:

(1) as promptly as possible after such appointment and in accordance with the provisions of this section—

(A) to return specifically identifiable property to the customers of the debtor entitled thereto;

(B) to distribute the single and separate fund, and (in advance thereof or concurrently therewith) pay to customers moneys advanced by SIPC, as provided in subsection (f);

(2) to operate the business of the debtor in order to complete open contractual commitments of the debtor pursuant to subsection (d);

(3) to enforce rights of subrogation as provided in this Act; and

* * * * *

(4) to liquidate the business of the debtor.

(b) POWERS AND DUTIES OF TRUSTEE.–

'(1) TRUSTEE POWERS.–A trustee appointed under section 5(b)(3) (hereinafter referred to as "trustee") shall be vested with the same powers and title with respect to the debtor and the property of the debtor, and the same rights to avoid preferences, as a trustee in bankruptcy and a trustee under chapter X of the Bankruptcy Act have with respect to a bankrupt and a chapter X debtor. In addition, a trustee shall have the right–

(A) with the approval of SIPC, to hire and fix the compensation of all personnel (including officers and employees of the debtor and of its examining authority) and other persons (including but not limited to accountants) that are deemed by such trustee necessary for all or any purposes of the liquidation proceeding, and

(B) to operate the business of the debtor in order to complete open contractual commitments pursuant to subsection (d),

and no approval of the court shall be required therefor.

(2) TRUSTEE DUTIES.–Except as inconsistent with the provisions of this Act or otherwise ordered by the court, a trustee shall be subject to the same duties as a trustee appointed under section 44 of the Bankruptcy Act, except that a trustee may, but shall have no duty to, reduce to money any securities in the single and separate fund (provided under subsection (c)(2)(B)) or in the general estate of the debtor.

(c) APPLICATION OF BANKRUPTCY ACT.–

(1) GENERAL PROVISIONS APPLICABLE. –Except as inconsistent with the provisions of this Act and except that in no event shall a plan of reorganization be formulated, a liquidation proceeding shall be conducted in accordance with, and as though it were being conducted under, the provisions of chapter X and such of the provisions (other than section 60e) of chapters I to VII, inclusive, of the Bankruptcy Act.

Bankruptcy Act of July 1, 1898, As Amended

Section 60(a)(1), 11 U.S.C. 96(a)(1):

"A preference is a transfer, as defined in this title, of any of the property of a debtor to or for the benefit of a creditor for or on account of an antecedent debt, made or suffered by such debtor while insolvent and within four months before the filing by or against him of the petition initiating a proceeding under this title, the effect of which transfer will be to enable such creditor to obtain a greater percentage of his debt than some other creditor of the same class."

Section 60(d), 11 U.S.C. 96(d):

"If a debtor shall, directly or indirectly, in contemplation of the filing of a petition by or against him, pay money or transfer property to an

attorney at law, for services rendered or to be rendered, the transaction may be examined by the court on its own motion or shall be examined by the court on petition of the trustee or any creditor and shall be held valid only to the extent of a reasonable amount to be determined by the court, and any excess obligation shall be canceled, or if excess payment or transfer has been made, return to the bankrupt."

Section 64(a), 11 U.S.C. 104(a):

"The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates . . . shall be (1) . . . one reasonable attorney's fee, for professional services actually rendered, irrespective of the number of attorneys employed, to the bankrupt in voluntary and involuntary cases . . . in such amount as the court may allow . . ."

STATEMENT OF THE CASE

On August 18, 1971, the Securities and Exchange Commission ("SEC") filed in the United States District Court for the Northern District of New York a complaint for injunction and appointment of a receiver and an application for a temporary restraining order against Alan F. Hughes, Inc. ("Hughes, Inc."), a small registered securities broker-dealer and Alan F. Hughes ("Hughes"), its principal officer and shareholder. The complaint charged that the firm, aided and abetted by Hughes, had violated provisions of the Securities Exchange Act of 1934, and bookkeeping, hypothecation, net capital and anti-fraud rules thereunder. The application for temporary restraining order which, *inter alia*, froze the firms assets was granted on August 20, 1971.

On September 7, 1971 defendants consented to permanent injunction. On the same day, the court heard oral argument on the SEC's motion for appointment of a receiver. The District Court denied the motion at that time, and instead, appointed a Special Fiscal Agent ("SFA"), to take control of Hughes, Inc., examine its books and report back on whether there was a need to appoint a receiver or to liquidate the firm.

On October 27, 1971, the SFA filed an extensive report recommending the appointment of a receiver and the liquidation of the firm.

After further briefing and oral argument, the District Court, by order of December 13, 1971, appointed a receiver "until such time as . . . the Securities Investor Protection Corporation makes a determination whether to install its own trustee pursuant to Section 5(a)9(2) of the 1970 Act . . . and a trustee is so installed."

On January 10, 1972 SIPC applied to the District Court for an order adjudicating the customers of Hughes, Inc. to be in need of protection, and appointing a trustee to liquidate the firm. On January 17, 1972, after briefing and oral argument, the District Court granted the application and appointed a trustee for the liquidation of the firm pursuant to Section 5(b)(3) of the 1970 Act.

Motion for reconsideration, after briefing and oral argument, was denied by order of February 10, 1972. Motion for stay pending appeal was denied by the District Court on February 22, 1972.

On the same day, motion for stay pending appeal was filed in this Court. Oral argument was set for February 29, 1972. After argument and consideration of the Court's observations. SIPC agreed that its trustee would refrain from liquidating the firm during the pendency of the appeal. Briefs were filed on an expedited basis and

oral argument was heard at an early date on March 10, 1972. The Court rendered its decision sustaining appointment of the receiver and the SIPC trustee on April 21, 1972.

Motion for provision for payment of attorney's fees as a matter of first priority from the estate of Hughes, Inc. and/or from SIPC funds was filed in the District Court on July 11, 1972. That motion also sought leave for counsel to withdraw (except for purposes of pursuing an appeal of the denial) in the event the principal relief was not granted. SIPC opposed the motion and questioned the right of counsel to retain the portion of fees and expenses that had been paid. Total fees and expenses of $7,117.26 were unpaid, due and owing. Billing was at the rate of $35.00 per hour. Payments totalling $2,118.86 had been made.

After hearing oral argument, the District Court issued its order dated August 11, 1972, denying the application for fees, upholding retention of legal fees that had been paid and granting counsel leave to withdraw except for the purpose of appealing that order.

Notice of Appeal was filed September 11, 1972, and the case was decided on June 21, 1973, as referred to hereinabove.

John B. Donohue, Jr., Counsel of record, was an employee of Shipley, Akerman, Stein & Kaps, counsel of record in the case, and acted in behalf of and for that office. All of the above proceedings involved substantial time, expense, and overhead in behalf of Hughes, Inc. and Mr. Hughes, its principal. Carl L. Shipley, acting for his office, is the petitioner herein.

REASONS FOR GRANTING THE WRIT

The court of first instance had jurisdiction herein pursuant to the Securities Investor Protection Act of 1970, cited hereinabove.

ARGUMENT

Petitioner makes the following contentions in support of his petition for a writ of certiorari:

In *SEC v. Alan F. Hughes, Inc.*, 461 F.2d 974, the second circuit characterized the litigation as,

> "... this case of first impression under the Securities Investor Protection Act of 1970 (15 U.S.C. 78aaa, et seq.)."

Petitioner's office rendered valuable legal services to the court in that proceeding in the capacity of counsel for the appellants.

Exercising authority under the 1970 Act, the Securities Investor Protection Corporation initiated proceedings which led to the appointment of a trustee and liquidation of appellant's business as a securities broker dealer. In this connection, all of the assets of appellant were seized. He was left without any funds to pay counsel for services in the proceeding.

The District Court denied petitioner's application for attorney's fees, and the court of appeals affirmed that decision. In so doing, the court of appeals decided an important question of federal law which has not been, but should be, settled by this court, i.e. that a securities broker dealer against whom the SIPC or SEC initiate liquidation proceedings cannot have from his assets funds with which to pay reasonable attorney's fees in protecting his statutory and constitutional rights.

If that is the settled law under the Securities Investor Protection Act of 1970, then the Act unconstitutionally denies to broker dealers against whom liquidation proceedings are initiated by SIPC the effective assistance of counsel of his choice. Without prospect of payment, no lawyer will represent such a client, and the court will be deprived of the assistance of counsel. The adversary system of judicial proceedings developed under the federal constitution implicitly assumes there will be legal counsel on each side. If a broker dealer who is the target of SIPC liquidation application proceedings can be deprived of means to hire a lawyer, his right of due process is significantly abridged.

The court of appeals in the decision below said in pertinent part:

> "... the Constitution ... does not require that a brokerage firm resisting an application under SIPC be entitled to have its attorneys paid out of the estate."

That statement is the equivalent of saying that in such proceedings the target broker dealer is not entitled to legal counsel in a proceeding that may result in the liquidation of his business, the destruction of his means of livelihood, and the loss of his good name and business reputation. It is difficult to imagine that Congress intended to give to SIPC the unilateral, ex parte power to wreak such havoc on target broker dealers without the check and balance of counsel to resist in behalf of the broker dealer. Such a concept, that an agency of government can have such unfettered and unchallengable power, is at war with the basic concepts of fair play this court has so often found in the federal constitution.

The court below ignores that there are two sources from which a respondent's legal counsel can be paid, i.e.

that liquidation estate, or the SIPC fund which the dues of respondent help create as provided in Section 4(c) of the SIPC Act.

The court can take notice in the record that the court-appointed trustee paid himself very substantial fees as a liquidator, with SIPC concurrence. But both the trustee and the SIPC strongly resisted petitioner's application for counsel fees for services rendered to the respondent broker dealer in the same proceeding. This is raw abuse of power and discretion, it is an arbitrary and capricious deprivation of the respondent's right to counsel, and in this case, it is tantamount to a taking of petitioner's property right in his professional time spent on this case without just compensation.

The court below cites no case in this court on this point, and the question should be settled. The SIPC Act of 1970 is a novel departure in that it seems to authorize a pre-bankruptcy liquidation of a securities broker dealer's business upon a "decree adjudicating that customers of such a member are in need of protection" (Section 5(a)(1)(3) of the 1970 Act).

Standing alone, that is an astonishing proposition, particularly when one reads Section 5(b)(1)(A) of the 1970 Act and finds that liquidation can take place without any determination of insolvency—simply on grounds of being the subject of a "pending proceeding" in which a receiver or trustee has been appointed (Section 5(b)(1)(A)(iii)), or a finding that the respondent broker dealer is not in "compliance with applicable requirements under the 1934 Act or rules or regulations of the Commission [SEC]. . . with respect to financial responsibility or hypothecation of customers securities" (Section 5(b)(1)(A)(iv)), or even on a finding that he is "unable to make such computations as may be necessary to establish compliance." (Section 5(b)(1)(A)(v)).

It is submitted that these three above-cited statutory bases for liquidation may have nothing to do with insolvency, or customer protection. It has been demonstrated before Committees of Congress that the SEC itself cannot twice in a row follow its own complicated net capital computation rule. In short, if Congress intended in the 1970 Act that these types of findings would be made against a respondent in a judicial proceeding where his funds have been impounded and he cannot employ competent legal counsel, then Congress has violated the constitutional guarantee of due process and equal protection.

The court's attention is directed to the statement in the decision below that:

> ". . . we do not understand the law to be that, as a general matter, the Constitution requires the appointment of counsel for litigants in civil cases. . . ."

That would hardly seem to be a correct statement of the law in a case where a quasi-government agency, the SIPC, has such penalty and forfeiture powers as total liquidation of a business for inability to compute net capital. The citations relied upon by the court below in footnote 5 of it's decision do not reflect that this court has settled that question, certainly not in so far as the SIPC Act of 1970 is concerned. If that is the law, then it is wrong and should be reconsidered by this court.

In any event, there are over 4,700 securities broker dealers in the U.S., most of whom are being assessed dues by SIPC, in which they are compelled by the Act to be members (SEC 38th Annual Report – 1972, p. 148), who have combined income of over $5 billion per year (supra, p. 147), and equity capital of nearly $10 billion. That is too large an investment to permit to be liquidated

on the iniative of the SIPC, against respondent broker dealers deprived of effective assistance of legal counsel.

Since the SIPC Act of 1970 will be with us from now on, and each year it can be anticipated there will be numerous liquidation proceedings (in its 1972 Annual Report, SIPC shows last year 64 firms in 21 states in liquidation), this court should settle the question of whether a target respondent is entitled to have reasonable attorney's fees in liquidation proceedings paid from his estate or the SIPC fund his assessments helped create. It is indeed a paradox that a respondent's assets or estate can be used to pay a court-appointed (SIPC selected) liquidator and his lawyers and accountants, and that liquidator and the SIPC can deny to respondent a use of his own funds or the benefit of SIPC funds to hire a lawyer.

The basic flaw in the decision of the court below is its conclusion that neither subsection 6(b)(1)(A) of the 1970 Act nor section 60d of the Bankruptcy Act permit payment of reasonable attorney's fees for a respondent. As to the SIPC Act of 1970 the court says that "the legal services in question do not fit into any of these categories" referring to overall provisions of that section. Similarly the court below disposes of section 60d of the Bankruptcy Act with similar dispatch concluding that it "is not a grant of authority to pay counsel fees." Petitioner respectfully submits that this cavalier approach by the court below raises questions of federal law which should be settled by this court in order that future liquidations under the SIPC Act of 1970 can proceed in an orderly way and within the constitutional safeguards of the adversary system.

CONCLUSION

Wherefore, it is respectfully requested that a writ of certiorari issue to the United States Court of Appeals for the Second Circuit to review its decision of June 21, 1973, referred to hereinabove.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 636—September Term, 1972.

(Argued May 29, 1973 Decided June 21, 1973.)

Docket No. 72-2166

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff-Appellee,

SECURITIES INVESTOR PROTECTION CORPORATION,

Applicant-Appellee,

—against—

ALAN F. HUGHES, INC. and ALAN F. HUGHES,

Defendants-Appellants.

Before:

MOORE, FRIENDLY and FEINBERG,

Circuit Judges.

Appeal from denial in United States District Court for the Northern District of New York, James T. Foley, *Ch.J.*, of application for counsel fees on behalf of attorneys representing broker-dealer in SIPC-initiated liquidation proceedings.

Affirmed.

JOHN BARRY DONOHUE, JR., Washington, D.C. (Shipley Akerman, Stein & Kaps, on the brief), *for Defendants-Appellants.*

WILFRED R. CARON, Associate General Counsel (Theodore H. Focht, General Counsel, Francis L. Carter, Attorney, on the brief), *for Appellee Securities Investor Protection Corporation.*

WINTHROP J. ALLEGAERT, New York, N.Y., *for Trustee.*

FEINBERG, *Circuit Judge:*

In August 1971, the Securities and Exchange Commission (SEC) filed a complaint in the United States District Court for the Northern District of New York alleging that Alan F. Hughes, Inc., a registered broker-dealer, aided and abetted by its president, Alan F. Hughes, had violated various provisions of the Securities Exchange Act of 1934. The complaint sought an injunction and appointment of a receiver. This relief was granted. Thereafter, the Securities Investor Protection Corporation (SIPC) determined that Hughes, Inc. was in danger of failing to meet its obligations to its customers and that there existed one or more of the conditions specified by section 5(b)(1)(A) of the Securities Investor Protection Act of 1970 (the 1970 Act), 15 U.S.C. § 78eee(b)(1)(A). In January 1972, Chief Judge James T. Foley, agreeing with SIPC's conclusions, granted its application for appointment of a trustee for liquidation of Hughes, Inc. under the 1970 Act.[1] The application by SIPC was hotly contested both in the district court and on appeal to this court on a number of grounds.

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1 Section 5(b)(3) of the 1970 Act, 15 U.S.C. § 78eee(b)(3).

The decision of this court, with which familiarity will be assumed, was the first to interpret the 1970 Act in a number of important respects. *SEC* v. *Alan F. Hughes, Inc.*, 461 F.2d 974 (2d Cir. 1972). Among other things, we held that a broker-dealer resisting an application by SIPC for liquidation is entitled to a de novo judicial determination that "the broker-dealer has failed or is in danger of failing to meet its obligations to its customers." 461 F.2d at 979.

So much is prologue to this proceeding, in which counsel for defendants in the prior litigation claim that for their services in resisting the SIPC application they are entitled to attorneys fees[2] as a matter of first priority from the estate of Hughes, Inc. or from SIPC funds, or from both. Their fee application was denied by Judge Foley on the ground that there was no legal basis for allowing such a fee,[3] and this appeal followed. Appellants argue that the 1970 Act and the Bankruptcy Act both authorize the compensation requested and that failure to so construe these Acts denies due process of law to those against whom SIPC proceeds, and is arbitrary, capricious and a denial of the equal protection of the laws.

The 1970 Act

In pressing their claim for compensation, appellants rely upon subsection 6(f)(2) of the 1970 Act, 15 U.S.C. § 78fff(f)(2), which provides that in addition to advancing funds for claims of customers against the broker-dealer being liquidated, "SIPC may advance to the trustee such

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2 The attorneys are seeking $7,117.26 in unpaid fees and expenses.

3 Judge Foley, however, did allow counsel to retain payments of $2,118.86 previously received from defendants for legal fees and expenses, and granted counsel's application to be relieved except to pursue this appeal.

moneys as may be required to effectuate subsection (b)(1)(A) of this section." Subsection 6(b)(1)(A) sets forth the powers of a trustee under the 1970 Act, which include the power, with SIPC approval, to

> hire and fix the compensation of all personnel . . . and other persons (including but not limited to accountants) that are deemed by such trustee necessary *for all or any purposes of the liquidation proceeding.* . . . [Emphasis added.]

Appellants argue that since this court held in its prior opinion that a de novo judicial hearing is an integral aspect of an SIPC liquidation proceeding, one of the "purposes" of that proceeding must be to give a broker-dealer a chance to show that the claims against it are insufficient or incorrect. For legal services in that endeavor, they claim the 1970 Act thus clearly authorizes compensation. However, this argument confuses a defendant's rights at an SIPC hearing with the congressionally-defined powers of an SIPC trustee. Section 6(a) of the 1970 Act, 15 U.S.C. § 78fff(a), enumerates the "purposes of the liquidation proceeding" to which subsection 6(b)(1)(A) refers. These are to return specifically identifiable property to the debtor's customers, to pay customers, to operate the debtor's business in order to complete open contractual commitments, to enforce rights of subrogation, and to liquidate the debtor's business. The legal services in question do not fit into any of these categories. Appellants' argument in its simplest form is that resisting liquidation is a purpose of the liquidation proceeding. While Congress could so provide, we do not believe that it has.

Appellants also argue that unless we accept their construction of the 1970 Act, respondents to SIPC liquidation applications will be unconstitutionally deprived of the as-

sistance of counsel. Appellants point out that the SEC and SIPC frequently act in tandem to tie up a firm's assets pending judicial determination of the application for a trusteeship and liquidation,[4] and argue that counsel will not undertake a defense without assurance of subsequent payment. Defendants obviously suffered no deprivation of legal services here, and the same willingness of attorneys to represent a debtor resisting involuntary proceedings under the Bankruptcy Act is a frequent phenomenon. Quite apart from the observation that we do not understand the law to be that, as a general matter, the Constitution requires the appointment of counsel for litigants in civil cases,[5] the analogy to the Bankruptcy Act is compelling. We have long held that legal services in resisting a bankruptcy petition are not compensable under that Act, see, e.g. *In re Evenod Perfumer, Inc.*, 67 F.2d 878 (2d Cir. 1933), cert. denied, 291 U.S. 671 (1934), and it has not been seriously doubted that this interpretation is constitutional. Moreover, if the Constitution does not require exemption from a filing fee for an indigent who seeks to take advantage of the bankruptcy laws, see *United States* v. *Kras*, 409 U.S. 434 (1973), it surely does not require that a brokerage firm resisting an application under SIPC be entitled to have its attorneys paid out of the estate.

The Bankruptcy Act

Appellants also rely upon sections 60d and 64a of the Bankruptcy Act, 11 U.S.C. §§ 96(d), 104(a), both of which,

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4 SIPC First Annual Report, 1971, pp. 22-23.

5 See, e.g., *Peterson* v. *Nadler*, 452 F.2d 754, 757 (8th Cir. 1971) (per curiam); *Bethea* v. *Crouse*, 417 F.2d 504, 505 (10th Cir. 1969); cf. *United States ex rel. Gordon* v. *Reincke*, 415 F.2d 1126, 1128 (2d Cir. 1969) (per curiam). But see Note, The Right to Counsel in Civil Litigation, 66 Colum. L. Rev. 1322 (1966). We do of course recognize that a federal district judge is given discretion to appoint counsel in civil cases pursuant to the salutary provisions of 28 U.S.C. § 1915(d).

under section 6(c)(1) of the 1970 Act, 15 U.S.C. § 78fff (c)(1), apply to SIPC liquidations. Section 64a gives a first priority claim against the estate of the debtor for

> one reasonable attorney's fee . . . irrespective of the number of attorneys employed, to the bankrupt in voluntary and involuntary cases . . . in such amount as the court may allow.

Appellants concede that the cases take a narrow view of the protection offered attorneys' fees by section 64, limiting compensation to services that "aid in the administration of the estate." Despite the authority that resisting a bankruptcy application does not so "aid" the estate, see *In re Evenod Perfumer, Inc.*, supra; 3A Collier on Bankruptcy ¶ 62.31[4] (14th ed. 1972), appellants argue that in the context of an SIPC liquidation the section should be construed differently to allow compensation for such services. The reasons given for distinguishing the two situations are that an SIPC proceeding is initiated by a public, not a private, body; that the proceeding may commence even though the broker-dealer may be solvent; and that allowing such attorneys' fees could greatly reduce the amount available for creditors in a straight bankruptcy proceeding, but would not affect the moneys going to broker-dealer customers in an SIPC proceeding.

The first of these arguments is, in this context, a distinction without a difference. The second is no distinction at all, since a creditor petitioning in bankruptcy and SIPC seeking a liquidation may each err in their allegations. Perhaps appellants' point is that SIPC may base a petition upon "technical" violations, such as bookkeeping deficiencies or an inability to meet net capital requirements,[6] whereas a creditor in straight bankruptcy must allege some-

6 See 15 U.S.C. § 78eee(b)(1)(A).

thing more substantial. The two-fold answer is that "technical" violations under the 1970 Act are frequently most significant, and, in any event, an SIPC liquidation cannot be ordered unless the court finds that the broker-dealer has failed or is in danger of failing to meet its obligations to its customers, surely not just a "technical" matter. The final point is the only one that gives pause at all—although not for long. It may be true that allowing fees to the attorneys for defendants in an SIPC proceeding would not reduce the fund available for most broker-dealer customers.[7] But it still does not follow that, when incorporating section 64a into the 1970 Act "[e]xcept as inconsistent with the provisions of" the Act, 15 U.S.C. § 78fff(c)(1), Congress intended to exclude well-settled judicial interpretations of that section.

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7 Customers of a broker-dealer with claims outstanding are entitled to share ratably in the "single and separate fund," composed of property held by the firm for customer accounts but not identified to a specific customer (specifically identifiable property is returned to the customer if he is entitled to it). 15 U.S.C. § 78fff(c)(2)(B), (C). If distribution of the fund leaves some claims still partially unsatisfied, SIPC is authorized to advance to the trustee funds for payment of the remaining customer claims up to $50,000 per account, except that no more than $20,000 per account will be advanced to cover claims for cash. 15 U.S.C. § 78fff(f)(1). If a customer's claim is still not fully satisfied, he can share in the general estate of the firm with the general creditors. Thus, unless a customer, because of his firm's inability to meet its obligations, faces a loss (after taking into account his share of firm assets) nearly as great as the maximum coverage provided by SIPC, there is no likelihood that diminution of the estate by payment of a priority claim to the firm's attorneys will reduce the customer's recovery. It should be noted, however, that while most customers are thus fully protected, a minority of large investors could face substantial losses in spite of SIPC's coverage. See Sowards & Mofsky, The Securities Investor Protection Act of 1970, 26 Bus. Law. 1271, 1283-84 n.60 (1971). Furthermore, to the extent that a priority claim for attorneys' fees would reduce the general estate, the rights of general creditors would be adversely affected. For an evaluation of the early performance of SIPC, see Note, The Securities Investor Protection Act of 1970: An Early Assessment, 73 Colum. L. Rev. 802 (1973).

Appellants' argument based upon section 60d of the Bankruptcy Act requires little discussion. That provision, reproduced in relevant part in the margin,[8] is not a grant of authority to pay counsel fees, as appellants suggest, but rather a vehicle for protecting estates against payment by a debtor of an excessive legal fee; the section permits attorneys to retain compensation only to the extent of reasonable value of services rendered before the filing of a bankruptcy petition and is not authority for allowance of fees for services after filing. See 3 Collier on Bankruptcy ¶ 60.68, at 1143 (14th ed. 1971). On this view, there is no basis for appellants' claim that the section authorizes payment of counsel fees for work done after the filing of the petition and that it is therefore arbitrary to treat such services differently, depending on whether the fee is paid before or after the filing. In any event, such distinctions based upon arbitrary dates abound in the Bankruptcy Act,[9] and they are not unconstitutional.

Judgment affirmed.

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8 If a debtor shall . . ., in contemplation of the filing of a petition . . ., pay money or transfer property to an attorney at law, for services rendered or to be rendered, the transaction may be examined by the court on its own motion or shall be examined by the court on petition of the trustee or any creditor and shall be held valid only to the extent of a reasonable amount to be determined by the court, and the excess may be recovered by the trustee for the benefit of the estate.

If, whether before or after filing, a debtor shall agree orally or in writing to pay money or transfer property to an attorney at law after the filing, the transaction may be examined by the court on its own motion or shall be examined by the court on petition of the bankrupt made prior to discharge and shall be held valid only to the extent of a reasonable amount . . ., and any excess obligation shall be cancelled, or . . . returned to the bankrupt.

9 E.g., 11 U.S.C. § 96(a)(1) (preference is transfer "to or for the benefit of a creditor . . . within four months before the filing" of bankruptcy petition).